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No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal From The Supreme Court Of Alabama

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I

JURISDICTION

Appellees present a series of largely unrelated objections to this Court's jurisdiction which, for the most part, reflect inaccurate characterizations of actual Alabama practice regarding the presentation of federal constitutional questions or a misunderstanding of the applicable federal rules formulated by this Court. Their specific objections will be addressed below as warranted. There is, however, a well established practice of the Supreme Court of Alabama which, standing alone, defeats all of appellees' arguments that appellant did not comply with Alabama practice as regards the presentation of its federal questions. That court regularly entertains and resolves on the merits questions presented for the first time on rehearing.

The cornerstone of appellees' argument, Br., at 10, is that "the Alabama courts do not permit new questions to be presented on rehearing." In support of this proposition, appellees cite one case in this Court, *Exxon Corp.* v. *Eagerton*,[1] and three cases in the court below. In one of those

[1] 462 U.S. 176 (1983). In the *Exxon* case, this Court declined to reach the question whether the Alabama statute at issue was preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.* (1976 ed. and Supp. V) ("EPAA"). In doing so, the Court observed that the "general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." 462 U.S., at 181 n.3. This observation, however, was made without any briefing of this issue by any of the parties before the Court. Appellant has now brought to the attention of this Court in its Jurisdictional Statement, Reply Memorandum, Brief and this Reply Brief, more than thirty-five cases in the court below in which issues raised for the first time on rehearing have been decided on the merits.

Appellant's point is not academic. For example, one of the cases relied upon in footnote 3 of *Exxon* was *Burton* v. *Burton*, 379 So.2d 617, 618

latter three cases, the court below, after reciting that it could not "sanction the practice of bringing up new questions for the first time in application for rehearing," went on to reach and decide the very question it disclaimed authority to decide. *Kirkland* v. *Kirkland*, 281 Ala. 42, 49, 198 So.2d 771, 777 (1967). In another, although the intermediate appellate court had refused to decide a question because it had been raised for the first time in an application for rehearing, the court below, after noting that fact, reached and decided that question without disturbing the holding of the intermediate appellate court that presentation of that question in an application for rehearing had been untimely. *Lovett* v. *Uptain*, 450 So.2d 113, 116 (Ala.

(Ala. Civ. App. 1980), in which, because it had not been raised in a timely fashion, the Court of Civil Appeals refused to decide an equal protection challenge similar to that decided by this Court in *Orr* v. *Orr*, 440 U.S. 268 (1979). That same court had previously refused to entertain a similar challenge for the same reason in *Hughes* v. *Hughes*, 362 So.2d 910 (Ala. Civ. App.), and the Supreme Court of Alabama dismissed a petition for a writ of certiorari. *Hughes* v. *Hughes*, 362 So.2d 918 (Ala. 1978). Notwithstanding these actions by the Alabama courts, which were brought to the attention of this Court by the appellee in *Hughes*, Motion to Dismiss or Affirm, at 2, this Court took jurisdiction over the appeal in *Hughes* and vacated the judgment of the court below. *Hughes* v. *Hughes*, 441 U.S. 901 (1979). The *Exxon* Court's citation to *Burton* cannot be reconciled with the Court's action in *Hughes* any more than its assumption in *Exxon* regarding the general practice of the Alabama courts can be reconciled with the many cases now brought to the Court's attention by appellant. The Court's action in *Exxon* can, however, be explained by reference to the suggestion by the Solicitor General in *Exxon* that because the issue of preemption under the EPAA had not been raised in the trial court, the record before the Court was factually deficient for purposes of deciding that preemption issue. Br. for the United States and the Federal Energy Regulatory Commission as Amici Curiae Supporting Reversal, at 12 n.10. There is no such deficiency here.

The other two cases in the court below relied upon in footnote 3 of *Exxon*, *State* v. *Newberry*, 336 So.2d 181, 183 (Ala. 1976), and *State* v. *Graf*, 280 Ala. 71, 72, 189 So.2d 912, 913 (1966), do not pronounce a rule of general applicability, but, rather, apply a distinct rule under which the State, in condemnation proceedings, is precluded from raising certain issues on appeal if it has not challenged the damages awarded for the particular taking involved.

Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116, 118 (Ala. 1984). The third case, *Stover* v. *Alabama Farm Bureau Insurance Co.*, 467 So.2d 251, 253 (Ala. 1985), also appears to be contrary to appellees' position because the holding in *Stover* is based on the Supreme Court of Alabama's "failure to address" an issue raised for the first time on rehearing during a prior appeal of the case rather than a lack of power to do so on that initial rehearing.

Appellant has previously pointed out that other cases relied upon by appellees in this Court, Motion to Dismiss, at 7, such as *King* v. *Reid*, 428 So.2d 611 (Ala. 1983), and *Ex parte Hanna*, 267 Ala. 527, 103 So.2d 720 (1958), are cases in which the court below, after suggesting it could not do so because of late presentation, reached the merits of a question. Similar cases in which the court below has decided constitutional and non-constitutional issues raised for the first time on rehearing are legion.[2]

These cases are also instructive on another relevant aspect of Alabama practice. When the court below has reached the merits and decided them against an applicant on rehearing, it generally has "overruled" the application, as in the case at bar. When, however, an applicant has failed to comply with any explicit rules governing applications for rehearing, the court below has generally either "stricken," "denied" or "dismissed" the application. For

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[2] *Louisville & Nashville Ry. Co.* v. *Western Union Telegraph Co.*, 195 Ala. 124, 71 So. 118 (1916); *Dunn* v. *Dean*, 196 Ala. 486, 71 So. 709 (1916); *Copeland* v. *Pope*, 198 Ala. 257, 73 So. 490 (1916); *Gibbons* v. *Gibbons*, 205 Ala. 636, 88 So. 833 (1921); *Martin Building Co.* v. *Imperial Laundry Co.*, 220 Ala. 90, 124 So. 82 (1929); *Consolidated Coal Co.* v. *State*, 236 Ala. 489, 183 So. 650 (1938); *Huie* v. *Smith*, 236 Ala. 516, 183 So. 661 (1938); *Federal Land Bank of New Orleans* v. *Williams*, 237 Ala. 318, 186 So. 689 (1939); *Dodson* v. *Beaird*, 237 Ala. 587, 187 So. 862 (1939); *Sisson* v. *Swift*, 243 Ala. 289, 9 So.2d 891 (1942); *Goodgame* v. *Dawson*, 242 Ala. 499, 7 So.2d 77 (1942); *Rudolph* v. *Rudolph*, 251 Ala. 317, 36 So.2d 902 (1948); *Howell* v. *Roueche*, 263 Ala. 83, 81 So.2d 297 (1955); *Bienville Mortgage Corp.* v. *Mayo*, 286 Ala. 675, 245 So.2d 819 (1971).

example, in *Thompson* v. *State*, 268 Ala. 483, 489, 107 So.2d 890, 895 (1959), both parties filed applications for rehearing; one of the applications was "stricken" as untimely without reaching the merits, while the merits of the other application were decided against the applicant and the application was "overruled." The use of the terms stricken, dismissed or denied to indicate procedural defects in applications for rehearing appears to be a consistent practice. *See, e.g., Hamm* v. *Harrigan*, 278 Ala. 521, 179 So.2d 154 (1965), *cert. denied*, 382 U.S. 981 (1966). If the court below believed that Questions 1, 3 and 4 had not been raised in a timely fashion, it certainly knew how to indicate that belief.

A. The Appellate Question

Appellees, Br., at 11, argue that the unbroken line of seventeen cases dating from 1861 in which the court below has entertained constitutional and statutory questions regarding § 12-22-72 raised for the first time on rehearing or other comparable post-judgment motions, *see* Br. of Appellant, at 12, and Juris. Stat., at 12-13 n.5, do not establish the relevant state practice regarding appellant's presentation of this question. Appellees, however, do not cite a single case in the court below which remotely suggests any basis upon which to distinguish any of those seventeen cases from this case.[3] And, as demonstrated by the fourteen cases cited in note 2, *supra*, and cases expressly relied upon by appellees (*Kirkland, Lovett, King* and *Hanna*), the practice of the court below in deciding questions regarding § 12-22-72 on rehearing is paralleled by that court's practice of deciding other questions—including federal constitutional

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[3] The fact that the court below has entertained questions regarding § 12-22-72 prior to rehearing, Br. of Appellees, at 11, is of no assistance to appellees. *Cf. NAACP* v. *Alabama*, 357 U.S. 449, 457 (1958) (presentation of federal question by way of certiorari rather than mandamus held sufficient to sustain this Court's jurisdiction because prior state cases do not suggest that mandamus, although available, is *exclusive* remedy).

questions—raised for the first time on rehearing or in other post-judgment proceedings.[4]

B. The Disqualification Question

Appellees' argument, Br., at 12, that the presentation of the issue concerning Justice Embry to the court below—one week after appellant discovered the relevant facts—was somehow untimely is patently frivolous and is, in any event, irrelevant given the disposition of appellant's challenge by each of the Justices below on an individual basis. Appellant documented its diligence in raising this issue in the court below in five sworn affidavits and one exhibit, *see*

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[4] Appellees acknowledge, as they must, that appellant's brief in support of its Application for Rehearing was timely filed on December 28, 1984, but argue, Br., at 10, that appellant did not comply with Alabama procedure because the constitutional issues were not identified in appellant's Application for Rehearing. Appellees' argument rests on the assumption—unsupported by citation to any Alabama rule or case—that, contrary to the clear import of Rule 20, Ala. R. App. P., issues are to be presented in a document captioned "Application for Rehearing." Appellees' argument would, apparently, seek to reinstate in Alabama practice the requirement that issues presented to appellate courts be identified in "assignments of error," a practice squarely rejected in the adoption of Rule 20, Ala. R. App. P. *See* App. 1a, *infra*.

Appellees' suggestion, Br., at 10 n.3, that Rule 40, Ala. R. App. P., requires a brief filed in support of an application for rehearing to "hew[ ] to that application" finds absolutely no support either in the plain language of that Rule—which nowhere suggests that the application itself need be anything more than a piece of paper requesting a rehearing—or any case construing Rule 40.

Appellees' confusion regarding Alabama practice is also reflected in their citation, Br., at 10 n.4, to § 6-6-27, *Code of Alabama* (1975), for the proposition that appellant failed to serve some unidentified "pleading" on the Attorney General of Alabama. Section 6-6-27 does not, so far as appellant has been able to determine, exist. In any event, the Attorney General was served with appellant's brief in full compliance with the only applicable rule, Rule 44, Ala. R. App. P., and has been served as required by the Rules of this Court. For the convenience of the Court, Rules 20, 40 & 44, Ala. R. App. P. and the Committee Comments thereon, are reprinted in the Appendix to this Reply Brief, *infra*.

Juris. Stat. at 8-10, Reply Mem., at 3 & n.2; J.S. App. 105a-107a, 130a-131a, 137a-144a.[5] Appellees' argument, Br., at 12, made without citation of authority, that "Since these pleadings were filed wholly outside the scope of the Alabama rules, the Alabama court was under no duty to consider Appellant's request at all . . . ," is disingenuous. No Alabama rule of appellate procedure even provides for challenging the qualifications of a Justice of the Supreme Court of Alabama. Nothing in the orders and opinion issued by the court below or the concurring opinions of the individual Justices suggests that that court regarded appellant's challenge as untimely in any sense.

C. The Contract Clause and Excessive Fines Clause Questions

Apparently relying on cases such as *Kirkland* v. *Kirkland* and *Lovett* v. *Uptain*, and without citation to any relevant rule,[6] appellees contend, Br., at 13, that the presentation of these questions "was certainly not within any construction of proper procedure in Alabama." Appellant has now brought to this Court's attention more than thirty-five cases establishing what the practice of the court below *is*. These

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[5] These documents refute appellees' inexplicable statement, Br., at 12, that "[a]ppellant did not attempt to explain why it could not have discovered the relevant facts" related to the disqualification issue at some earlier date. Appellees' unstated premise is that litigants in the Alabama courts must constantly monitor the filings in all trial courts in Alabama in order to discover whether a judge in their case is a party in another case involving similar issues. Surely litigants in Alabama (and all States) have a right to the minimal expectation that jurists will not attempt to adjudicate claims while pursuing and advocating the same types of claims on behalf of themselves and others without disclosing the existence of such a peculiar dual vocation.

[6] Appellees' citation, Br., at 13 n.9, to Rule 40, Ala. R. App. P., as being relevant to the raising of the Contract Clause question is puzzling. Appellant has acknowledged from the very outset, Juris. Stat., at 13, that the Contract Clause had not been *cited* to the court below until February 21, 1985. Appellant has argued that the Contract Clause question was nothing more than an enlargement of a question presented to the court below in its brief filed December 28, 1984. Appellant stands on that argument.

cases and, remarkably, the very cases of the court below relied upon by appellees as discussed above, establish that this Court may address all of the Questions Presented without undermining any Alabama rule or practice. Appellees have not, and cannot, establish any practice in the court below that has been so "strictly or regularly followed" as to bring this case outside the rule laid down by this Court in *Barr* v. *City of Columbia,* 378 U.S. 146, 149 (1964). Indeed, the Alabama cases relied upon by appellant are, if anything, more persuasive on the points at issue than were the cases of the court below relied upon by this Court in *NAACP* v. *Alabama,* 377 U.S. 288, 297-301 (1964), in rejecting a square holding by the court below that the federal question brought here had not been presented in conformity with Alabama practice.

II

THE UNCONSTITUTIONALITY OF § 12-22-72

Appellees' defense of § 12-22-72 proceeds by ignoring the special solicitude this Court has historically shown towards preserving equal access to appellate courts, *Lindsey* v. *Normet,* 405 U.S. 56, 77 (1972), and by failing to grapple with the fact that § 12-22-72 is entirely superfluous to an existing, comprehensive and even-handed system for dealing with the state interests purportedly vindicated by § 12-22-72. Striking down the appeal penalty will leave the Alabama courts fully able to deal with frivolous or dilatory appeals and will leave litigants fully protected by post-judgment interest.

No suggestion has been made, and none could be, that appellant's appeal below was either dilatory or frivolous. Thus, in this case the statute manifestly does not serve the purpose of controlling such appeals. However, even if it had, costs and damages could have been assessed against appellant after a judicial determination had been made pursuant to Rule 38, Ala. R. App. P. That rule, of course, penalizes *only* litigants who take frivolous or dilatory ap-

peals and draws no arbitrary and irrational distinctions among plaintiff-appellants and defendant-appellants; it is, therefore, unobjectionable.

Appellees unaccountably ignore altogether the fact that Alabama already provides for interest to be assessed on any money judgment, presently at the rate of twelve percent per annum, thereby fully protecting the interests of a party who secures a money judgment at trial, Rule 37, Ala. R. App. P.; § 8-8-10, *Code of Alabama* (1975), and removes any "incentive to delay payment by filing an appeal, regardless of its merits." Br. of Appellees, at 16.

Bereft of any plausible basis on which to argue that § 12-22-72 is rational on its face or as applied to appellant, appellees fall back on the argument that the ten percent penalty is rational because it imposes "additional damages." Br., at 15, *quoting City of Birmingham* v. *Bowen,* 254 Ala. 41, 47, 47 So.2d 174, 186 (1950). But as appellant has pointed out, Br., at 21, under *Lindsey* v. *Normet,* a state may only impose burdens on the right of access to appellate courts which are both "reasonably tailored" to serve identifiable interests not already served by other statutes and rules and are uniformly and indiscriminately applied. 405 U.S., at 78.[7] Section 12-22-72 is indefensible on both counts.

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[7] Appellees' reliance, Br., at 16-17, on this Court's decision in *Louisville & Nashville Ry. Co.* v. *Stewart,* 241 U.S. 261 (1916), in defense of § 12-22-72 is misplaced. The opinion in that case does not refer to the Equal Protection Clause at all, and an examination of the briefs submitted to this Court establishes that this Court was presented with and presumptively decided, at most, the question whether the state appeal penalty challenged in that case was preempted by federal statutory law. *See* Br. of Louisville & Nashville Ry. Co. as plaintiff in error, at 10-12; Br. of Stewart as defendant in error, at 35-38.

Likewise, appellees' suggestion, Br., at 17, that statutes enacted by Arizona, Georgia, Oregon and additional unidentified states (other than Mississippi and Virginia) somehow support their position is misleading. Under appellant's submission, the Arizona, Georgia and Oregon statutes cited by appellees would be defensible because the imposition of penalties under them is discretionary and based upon judicial determinations that imposi-

III

THE DISQUALIFICATION QUESTION

The centerpiece of appellees' defense of the conduct of Justice Embry is based on their extraordinary assertions, Br., at 19, 22-24, that a self-serving recital in a Stipulation for Dismissal ("Stipulation"), filed in Justice Embry's class action suit against Blue Cross somehow retroactively cleansed the record of the effects of his prior conduct. In the Stipulation, Justice Embry's attorney declares on his behalf that the "primary objective" of his class action was not to recover the damages which he sought on behalf of himself and other Alabama public employees, but to require Blue Cross to process claims in a "timely and efficient manner." From this statement, appellees draw the conclusion and make the representation to this Court that Justice Embry's "suit was dismissed . . . without payment

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tion is warranted because an appeal has been found to be frivolous. *Cooper* v. *Cooper*, 130 Ariz. 257, 261, 635 P.2d 850, 854 (1984); *Prattes* v. *Southeast Ceramics, Inc.*, 132 Ga. App. 584, 208 S.E.2d 600 (1974); *Stirling* v. *Dari-Delite, Inc.*, 494 P.2d 252 (Ore. 1972) (supplemental decision), 498 P.2d 753 (Ore. 1972) (on motion to recall mandate). The Virginia statute cited by appellees, § 16.1-113, *Code of Virginia* (1985 Cum. Supp.), would appear to impose a penalty similar to additional interest, "ten percent annually," for "the purpose of discouraging appeals with little or no basis in law or fact from courts not of record." *Nationwide Mutual Ins. Co.* v. *Tuttle*, 208 Va. 28, 33, 155 S.E.2d 358, 362 (1967). Thus, unlike § 12-22-72, the Virginia statute bears at least some rational relationship to the state interest in compensating plaintiffs for delay in receiving money judgments.

Thus, appellees are left with defending the proposition that the statutes of two States—Alabama and Mississippi—are somehow constitutional notwithstanding the decision in *Lindsey* v. *Normet* and decisions of federal courts of appeals which have applied *Lindsey* to strike down federal statutory burdens on the right of access to appellate courts, *O'Day* v. *George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), and state rules, *Lecates* v. *Justice of the Peace Court No. 4*, 637 F.2d 898 (3rd Cir. 1980). If there were safety in numbers, appellees could still not overcome the clear teaching of this Court in *Lindsey* v. *Normet*. Unfortunately for appellees, there is no safe haven in the statute of one other State which, like § 12-22-72, would appear to be a relic of the Nineteenth century.

of any sum," Br., at 18, and that "Justice Embry's goal . . . was . . . not a pecuniary gain to himself." Br., at 22.[8]

Whether that Stipulation—filed almost two months after appellant first challenged Justice Embry's qualifications and almost one month after the court below denied appellant's second attempt to secure a fair hearing and after Justice Powell granted appellant's Application for Stay in this Court—has any probative value is highly doubtful.[9] Nothing in that document, however, can obliterate the fact that Justice Embry sought punitive damages for himself and the putative class from the day his suit was filed until after appellant filed its notice of appeal from the decision below; nothing can alter the fact that Justice Embry's

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[8] In a letter filed with the Clerk of this Court on November 8, 1985, appellees drew attention to a newspaper report quoting former Justice Embry as stating that he received a "tidy sum" in connection with the settlement of his class action against Blue Cross. The record presently before this Court does not establish how much money Justice Embry received for settling his class action, whether putative class members received notice of that settlement, or any other details of this highly unusual case. Appellant's challenge to Justice Embry's conduct does not, in any event, depend on establishing his subjective intent at the time he settled his case against Blue Cross. Justice Embry had two opportunities to explain his conduct as a sitting member of the court below and chose not to do so. The record presented to this Court regarding the impropriety of Justice Embry's conduct speaks for itself. Appellant is informed that the information in appellees' November 8 letter to the Clerk will be filed with the Court by appellees in a Supplemental Brief during the week of November 25, 1985.

[9] Appellant is obliged to call to this Court's attention several errors contained in the Brief of Appellees, at 18 n.14, wherein it is stated that "Appellant did not reveal [the fact of dismissal] . . . in its brief (apart from the docket sheet appended to the brief)." Appellant in fact "revealed" and relied upon the fact of dismissal to this Court in the text of its Brief, at 27-28. In addition, appellees' totally unsupported allegation in that same footnote that appellant or its counsel were aware of that dismissal prior to the filing of appellant's Reply Memorandum in this case on May 14, 1985, and their innuendo that appellant may have intentionally withheld that fact from this Court, does not warrant a response. *See Supreme Council of the Royal Arcanum* v. *Green*, 237 U.S. 531, 546-47 (1915).

complaint against Blue Cross raised issues virtually identical to the issues raised and decided in this case in a 5-4 opinion written by Justice Embry which, itself, exhibits in its purported "fact-finding"[10] the bias that permeated the consideration of this case below; and nothing can erase the remarkable statements made by Justice Embry under oath in his January 10, 1985 deposition while this case was pending on rehearing before him and the court below. Appellees do not dwell on these aspects of the record because they are indefensible. Instead, appellees, Br., at 21 n.18, argue that appellant's claim is "dubious" because, without Justice Embry's participation, the verdict would have presumably been affirmed by an evenly divided court below. This argument assumes the propriety of the participation by a constitutionally disqualified judge in the consideration of a case and ignores the fact that Justice Embry testified, under oath, that his opinion began as a dissenting opinion but ultimately won over the critical fifth vote in late 1984.

Appellees' defense of the six Justices who apparently did not withdraw from the putative class prior to dismissal of Justice Embry's class action appears to be that, since Justice Embry's conduct did not violate appellant's right to a fair hearing, then "[*a*] *fortiori*, the same is true for the other justices . . . ." Br., at 28.[11] Appellant does not argue

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[10] Appellees argue, Br., at 26, that nothing in the "record" establishes Justice Embry's bias against appellant. However, one of the many examples of bias which can be gleaned from a careful review of the record in this case is Justice Embry's "finding" that a claims representative of appellant was engaged in a "cover-up, through deceit," J.S. App. 37a, 470 So.2d, at 1077, a "finding" based, J.S. App. 16a, 470 So.2d, at 1067-68, on testimony presented outside the presence of the jury, R. 99. As the record reflects, counsel for appellees at trial flatly accused that representative of having "lied," *id.*, but the trial judge, after a searching inquiry, found no inconsistencies," R. 137, in the representative's sworn statements. Thus, Justice Embry's biases are reflected not only in the record before this Court but in the opinion he authored.

[11] Contrary to appellees' argument, Br., at 19 n.15, appellant has never abandoned its argument that failure of these six Justices *to withdraw* from the putative class would require their recusal from any further hear-

that the apparent failure of those six Justices to withdraw from the putative class was as constitutionally unacceptable as the conduct of Justice Embry. Appellant's position is that this Court should announce that the Constitution requires judges to recuse themselves from participation in a case under these circumstances where they have actual notice of their inclusion in a putative class and they do not withdraw from that class.[12]

IV

THE CONTRACT CLAUSE QUESTION

Appellees do not dispute appellant's proposition that *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), and other cases in this Court holding judicial actions unreviewable under the Contract Clause, have involved judicial actions interpreting state statutes or revising previous interpretations of state statutes.[13] Nor do appellees argue that the

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ing of the appellant's case. Appellees' quotation from footnote 2 of the Juris. Stat., at 9, inexplicably leaves out the phrase "in and of itself" and makes no mention of the last sentence of footnote 2, both of which make clear that appellant's challenge to members of the court below other than Justice Embry was grounded in a failure to withdraw from the putative class after notice of their membership in it. If, contrary to appellant's arguments, further proceedings in this case of a non-ministerial nature in the court below must be held, then this Court should decide now, in the interest of judicial economy, whether judges may constitutionally participate in the decision of cases under these circumstances. If any of those Justices withdrew, or indicated an intent to withdraw, from that putative class prior to April 16, 1985, there is time enough for that fact to be demonstrated on remand from this Court.

[12] The cases cited by appellees, Br. at 28 n.27, to support the proposition that Justice Embry's "voting record" demonstrates no personal bias against insurance companies generally are either irrelevant to this case because they did not raise any issue presented in appellant's appeal to the court below (six cases), or serve to illustrate the dramatic change in the "directed verdict" law made in this case (three cases). *See* appellant's Reply Memorandum, at 7 & n.5.

[13] The issue presented to this Court in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), was whether the Supreme Court of Oklahoma had

act of a state court in creating a new cause of action is functionally different from the act of a state legislature in creating a statutory right of action.

Rather, appellees argue that the word "pass," as it appears in the Contract Clause, conclusively establishes that that Clause cannot be construed to apply to judicial action in *any* circumstances. Appellees' construction of the word "pass" in the Contract Clause cannot be reconciled with operative words used elsewhere in the Constitution to describe the lawmaking process. Thus, the First Amendment provides that "Congress shall make no law . . . ," yet the First Amendment has been interpreted expressly to control judicially fashioned common law rights of action. *See, e.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964).[14] The First Amendment's specific reference to the national legislature, "Congress," in direct contrast to the more general and inclusive expression, "No State," in the Contract Clause, without limitation to the legislative branch of state government, makes it considerably more difficult to construe the First Amendment as applicable to judicial action than to so construe the Contract Clause. Indeed, appellees' argument effectively adds the word "legislature" after the introductory words of the Contract Clause, "No State." But this Court, in interpreting parallel language in the Fourteenth Amendment, has precluded the textual interpretation urged by appellees:

> "No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the

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"adopt[ed] a different construction of the controlling statutes" so as to violate Tidal Oil's "obligations of its contract . . . ." Tr. of Rec., at 152. *See* Pet. for a Writ of Certiorari, at 12; Response to Motion of Defendant in Error to Dismiss or Affirm, at 7.

[14] In applying the First Amendment, through the Due Process Clause of the Fourteenth Amendment, to control purely judicial action in *Bridges* v. *California,* 314 U.S. 252 (1941), this Court unflinchingly stated that the First Amendment "prohibits any *law* 'abridging the freedom of speech . . . .'" *Id.,* at 263 (emphasis added).

> United States .... [These prohibitions] have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities."

Ex parte Virginia, 100 U.S. 339, 346-47 (1879) (emphasis in original).

In addition, the Framers' inconsequential use of the word "pass," Br. of Appellant, at 31-36 nn. 7, 8 & 11, can surely not be deemed sufficient to overcome appellant's substantial and largely unchallenged evidence that the word "Law" was understood under English common law, and therefore presumptively by the Framers, to comprehend judicially fashioned common law. Finally, appellees' argument, Br., at 32-33 n.40, that this judicially created tort is not in any event an impairment of the contract here because it is "extra-contractual" is foreclosed by this Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, No. 83-1748, slip op., at 11-16, 105 S. Ct. 1904, 1912-15 (1985).

V

THE EXCESSIVE FINES CLAUSE AND DUE PROCESS CLAUSE QUESTION

Appellees, Br., at 40, concede that "the historic purposes of punitive damages in civil cases [are] to punish ... and to deter ...." The court below confirmed that punitive damages in Alabama serve these precise functions: "To punish the defendant ... *and* to warn or deter others ...." J.S. App. 34a, 470 So.2d, at 1076. No clearer statement of the purposes of criminal law sanctions could be articulated. *See, e.g., Trop* v. *Dulles*, 356 U.S. 86, 96 (1958) (plurality opinion). Thus, under any purposive analysis, civil litigants seeking punitive damages (or "private fines" as expressed by this Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)) have quite literally, and in the very words of this Court in *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), been "entrusted with the criminal-

law function of government." *See also Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (punitive damages "serve the same function as criminal penalties and are in effect private fines.").

Appellees have not responded, because there is no plausible response, to appellant's analysis based upon the purposes of the Eighth Amendment. Appellees also avoid challenging appellant's demonstration that punitive damages were regarded as "fines"—as that term was used in the Eighth Amendment and as that term was understood under English common law—in the Eighteenth century.

Instead, appellees engage in a confused and confusing attempt to equate punitive damages with "civil penalties," a different term encompassing a variety of sanctions enacted and imposed for a multitude of purposes. Appellees' discourse on "civil penalties" simply misses the point: punitive damages are identical in purpose to criminal fines, they share common historical roots with criminal fines, and therefore they should be subject to the same limits on excessiveness and the same principle of proportionality as are established by the Eighth Amendment.[15]

Appellees misunderstand the Eighth Amendment issue completely when they suggest that appellant's argument is that punitive damages cannot be imposed in a civil pro-

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[15] Appellees' reference, Br., at 33-34, to the "holding" of *Ex parte Watkins*, 32 U.S. (7 Pet. 568 (1833), is likewise confused. Watkins, a federal prisoner, had sought a writ of habeas corpus claiming that he was being illegally detained because of his inability to pay fines imposed as a result of his federal conviction. He also claimed the fines to be excessive in violation of the Eighth Amendment. In considering Watkins' Eighth Amendment claim, the Court's opinion made the simple declaratory statement, characterized by appellees as a "holding," that the "eighth amendment is addressed to the courts of the United States exercising criminal jurisdiction . . . ." *Id.*, at 574. Appellees' suggestion that this declaratory sentence addressed or resolved the applicability of the Excessive Fines Clause to punitive damages awarded in civil proceedings is obviously incorrect. The Court went on to *hold*, in the sentence that followed, that it had "no appellate jurisdiction to revise the sentences of inferior courts in criminal cases . . . ." *Id.*

ceeding. Appellant opposes *excessive* private fines. Appellees are likewise in error in suggesting that the many federal statutes providing for the recovery of punitive or treble damages by the Government or, in some cases, private litigants, would be rendered unconstitutional by appellant's argument. As appellant, Br., at 42, has pointed out, double and treble *statutory* damages were perhaps the first form of punitive damages in England;[16] because of their roots and their imposition on the basis of legislative approval, double or treble damages would presumptively not be excessive in the constitutional sense. The punitive damages in this case are, of course, more than 700 times what treble damages would have been.

Appellees' argument that the punitive damage award in this case is not, in any event, "excessive" is even more confused. Appellees suggest, Br., at 39-43, that punitive damages assessed in connection with the performance of a contract need not bear any relationship to the injury inflicted, but, rather, to a number of other factors such as the need to provide an incentive for lawsuits, Br., at 38 n.48, the emotional state of the plaintiff, Br., at 40 n.51, or the wealth or degree of sophistication of the defendant, Br., at 40-41. This attempt by appellees to justify, apparently as a matter of policy, punitive damages by reference to their speculative consequences in some cases says nothing about the central inquiry under the Excessive Fines Clause.

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[16] Although the punitive damage awards assessed in civil proceedings brought by private plaintiffs were generally paid to the Crown, *see* Br. of Appellant, at 43-44, those awards for a "public misdemeanor which is coupled with a private injury," 3 W. Blackstone, *Commentaries on the Law of England* *398 (1768), were awarded to private plaintiffs instead of the Crown as early as 1763. *See Wilkes* v. *Wood*, Lofft. 1, 98 Eng. Rep. 489 (1763). The punitive function of those awards, however, continued "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Id.*, at 19, 98 Eng. Rep., at 498-99.

The magnitude of the act for which punishment is administered is clearly the most relevant consideration in assessing the excessiveness or disproportionality of a particular punishment. *Solem* v. *Helm*, 463 U.S. 277, 290-91 (1983). As this Court observed in *Solem*, "[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars . . . ." *Id.*, at 293. Here, appellant's conduct, cast in its worst light, was to withhold willfully the sum of $1,650.22. Even if this had been a theft of this amount, a $3,500,000 fine is excessive under any standard.

Under appellant's submission, Alabama would be free, by legislative or judicial action operating prospectively, to award attorneys' fees and to create other reasonable bases for compensating persons whose contractual rights have been breached. Alabama may not, however, permit its courts and juries, without discernible or reviewable standards, to award grossly excessive punitive damages simply to inflict punishment and create a windfall for an occasional plaintiff.[17]

Measured against any comparable assessment of an appropriate punishment imposed by the Alabama legislature for identical or comparable conduct, Br. of Appellant, at 44-45, measured against actual injury, measured against statutory civil punishment for violation of federal antitrust laws, or measured against any other appropriate comparison in civil or criminal jurisprudence, the punitive

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[17] Appellees' assertion, Br., at 43, that it is "likely that a substantial portion of the $3.5 million judgment represents compensation"—as opposed to punitive damages, cannot be squared with the recognition by appellees and the court below that all the damages in excess of $1,650.22 in contractual damages were *punitive* damages. As stated by the court, this case involves "a verdict for the plaintiffs in the sum of $3.501.650.22, of which sum $3.500.000 was for punitive damages." J.S. App. 1, 470 So.2d, at 1061. This *post hoc* rationalization by appellees is also contradicted by the instruction to the jury on damages, which left the jury virtually unfettered discretion to impose punitive damages bearing no relationship whatsoever to any proven actual injury inflicted on appellees. R. 589. "[P]unitive damages . . . are not awarded to compensate the injured party." *Smith* v. *Wade*, 461 U.S. 30, 49 (1983).